No. 5278

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HOTCHKISS REDWOOD COMPANY
(a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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I.

STATEMENT OF FACTS.

This is a suit brought by Hotchkiss Redwood Company, a corporation, defendant in error, hereinafter called the plaintiff, against the United States, plaintiff in error, hereinafter called the defendant, to recover the total sum of $9621.66 (and interest) assessed against and collected from plaintiff under the provisions of Section 1000 (1) of the Revenue Act of 1918 and Section 1000 (1) of the Revenue Act of 1921, as capital stock taxes for the five taxable years ending June 30, 1920, 1921, 1922, 1923, and 1924, involving the period from June 30, 1919, to and including June 30, 1924. The capital stock tax imposed by said revenue acts was "a special excise tax with respect to carrying on or doing business".

Section 1000 (2) (c) of the Revenue Act of 1918 and Section 1000 (2) (b) of the Revenue Act of 1921 contained the further provision that "the taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business * * * during the preceding year ending June 30, * * *".

Claim for refund of said sum of $9621.66, on the ground that plaintiff was not engaged in or doing business during said period and was exempt from the capital stock tax, was duly filed with the Commissioner of Internal Revenue as required by law, and denied by said Commissioner. Plaintiff then brought suit in the United States District Court for the Northern District of California, Southern Division, to recover said taxes, on the same ground. The court made special findings of fact (Tr. p. 22) and rendered judgment for plaintiff (Tr. p. 31), from which defendant sued out this writ of error.

The salient facts, summarized from the special findings of fact, are as follows:

Plaintiff is a California corporation, having been incorporated on June 19, 1919. In June, 1919, plaintiff acquired from the Hotchkiss Timber Company, a California corporation, all the assets of said corporation, which consisted of a tract of redwood timber land situate in the County of Del Norte, State of California, acquired by the Timber Company in 1906, and containing approximately 19,754.79 acres, in exchange for 17,541 shares of capital stock of plaintiff, which were issued to said Hotchkiss Timber Company

and by the latter distributed to its stockholders. Thereafter said Hotchkiss Timber Company was duly dissolved according to law.

The object of incorporating plaintiff was to expedite the sale and issuance of a new bond issue, secured by a mortgage on said tract of land, in order to pay off a bond issue owing by said Hotchkiss Timber Company and to avoid waiting the length of time which was required by law to elapse before said Hotchkiss Timber Company could lawfully put out a new bond issue. Upon its incorporation, plaintiff issued and sold bonds in the principal sum of $550,000, dated July 1, 1919, bearing six (6) per cent interest, secured by a mortgage on said tract of land, the proceeds of which bonds were used to pay off said prior bond issue of said Hotchkiss Timber Company.

Said Hotchkiss Timber Company and plaintiff, as its successor, acquired said tract of redwood timber land for the sole purpose of owning and holding the same and reselling it as a whole at a profit, if possible.

Neither said Hotchkiss Timber Company nor plaintiff ever intended or proposed to cut or market the timber on said tract of land, or any part thereof.

From its date of incorporation until June 30, 1924, plaintiff did not sell or dispose of said tract of land, or any part thereof, except a small strip of land which it conveyed to the County of Del Norte for highway purposes in the year 1920, and for the timber on which it received the sum of $5036.54. Said strip of land would have been condemned by said

County of Del Norte for highway purposes if plaintiff had not voluntarily conveyed it.

During all of said period plaintiff did not cut or sell or endeavor to sell any of the timber on said tract of land, except the timber on the land sold to the County of Del Norte; did not lease or endeavor to lease said tract of land, or any part thereof; did not receive any income, rents, profits or issues from said tract of land, or any part thereof, except said sum received from said County of Del Norte; did not own or have any interest whatever in any property, except said tract of land; had no other income, profit or receipts whatever, except the proceeds of assessments levied on the stockholders of plaintiff and the proceeds received from the bonds issued by plaintiff in 1919.

During said period the president of plaintiff occasionally had negotiations, on behalf of plaintiff, with prospective purchasers and also with brokers as to the sale of said tract of land. No person was employed by plaintiff to sell said tract of land, or any part thereof, and said tract of land was never advertised for sale.

During all of said period plaintiff had or engaged in no other activity whatever.

During all of said period plaintiff had no office of its own, but its books and corporate records were kept in the office of W. J. Hotchkiss, its president, in San Francisco, California.

From November 19, 1919, to June, 1923, plaintiff paid to L. M. Owens the sum of $50 per month as a salary for services rendered as secretary of plaintiff.

From July, 1923, to June 30, 1924, plaintiff paid the sum of $150 per month to said W. J. Hocthkiss on account of office expenses.

During all of said period plaintiff paid no other salaries, employment compensation or office rent whatever.

During all of said period plaintiff maintained its corporate existence and carried on its purely internal affairs, including the holding of necessary directors' and stockholders' meetings.

From time to time during said period plaintiff levied assessments on its issued capital stock to pay the taxes on said tract of land, interest on its bonded indebtedness and other necessary charges and expenses, and collected said assessments and paid said taxes, interest, charges and expenses.

II.

ARGUMENT.

A.

THE RULE IS WELL ESTABLISHED THAT THE OWNING AND HOLDING OF PROPERTY BY A CORPORATION, AND THE MAINTENANCE OF ITS CORPORATE EXISTENCE AND THE CARRYING ON OF ITS PURELY INTERNAL AFFAIRS, DOES NOT CONSTITUTE THE DOING OF BUSINESS BY SUCH CORPORATION SO AS TO MAKE IT SUBJECT TO CAPITAL STOCK TAX.

As has been seen from the statement of facts, plaintiff's activity during the period in question consisted in the owning and holding of a tract of timber land, in the maintenance of its corporate existence, in the

carrying on of its internal affairs and in the levying of assessments upon its stockholders to pay its taxes, carrying charges and office and miscellaneous expenses.

Our contention, succinctly stated, is that the owning and holding of property by a corporation, and the maintenance of its corporate existence and the carrying on of its purely internal affairs, does not constitute the doing of business by such corporation so as to make it subject to the capital stock tax. This has been established by a long line of federal decisions, of both the Supreme Court and the lower Federal Courts, some of which involved the capital stock tax and some the corporation excise tax imposed by the Corporation Excise Tax Act of 1909 (36 Stat. 112). The latter act also imposed a special excise tax "with respect to the carrying on or doing business" by a corporation, and, as is conceded by counsel for defendant, the decisions as to what constituted doing business under the 1909 Act are equally applicable to the case at bar.

There is no better statement of the rule than the quotation from the case of *Von Baumbach v. Sargent Land Co.,* 242 U. S. 503, 61 L. Ed. 460, which is set forth in defendant's brief, reading as follows:

> "It is evident from what this court has said in dealing with former cases, that the decision in each instance must depend upon the particular facts before the court. The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and distribution of its avails, and doing only the acts necessary to continue that status, and one which is still active

> and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes."

With this rule in mind, let us turn to cases where it has been applied—cases which we submit are directly determinative of this one, compelling the conclusion that plaintiff was not engaged in or doing business.

In *McCoach v. Minehill & Schuylkill Haven Railroad Co.,* 228 U. S. 295, 57 L. Ed. 842, it appeared that plaintiff had been incorporated to construct and operate a railroad in Pennsylvania. Later, by permission of the state legislature, it leased its railroad for ninety-nine years at an annual rental of $252,612, which brought a return of six (6) per cent upon its issued capital stock. Thereafter it maintained its corporate existence and organization, kept an office, paid salaries to its officers and clerks, and paid taxes, its expense for corporate maintenance being about $5000 per year and its taxes about $24,000 per year. It collected the annual rental and also had bank accounts on which it received annual sums of money as interest, and also maintained a contingent fund from which it received annual sums as interest or dividends amounting to about $24,000, and distributed its net proceeds annually to its stockholders in the form of dividends. The question was whether under such circumstances it was liable for the corporation excise tax imposed by the Act of 1909, and the Supreme Court held that it was not engaged in business and was not liable for the tax.

In *United States v. Emery, Bird, Thayer Realty Co.,* 237 U. S. 28, 59 L. Ed. 825, the Supreme Court held that the Realty Co. was not engaged in business so as to render it liable for the corporation excise tax, on the following facts:

The Emery, Bird, Thayer Dry Goods Co., a business corporation of Kansas City, Missouri, occupied certain lands, partly hired and partly owned by it, for the purpose of its business. Its members later organized the Emery, Bird, Thayer Realty Co. for the purpose of acquiring the dry goods company's lands and of letting the same to the dry goods company. The only business done by the realty company was to keep up its corporate organization and to collect and distribute the rent received from its single lessee. It also covenanted to rebuild in case the buildings were destroyed. Its charter powers included performing and enforcing the performance of the respective covenants in the leases taken over and the sale of the property or any part of it upon the vote of not less than two-thirds of the stockholders. The court said:

> "The claimants' characteristic charter function, and the only one that it was carrying on, was the bare receipt and distribution to its stockholders of rent from a specified parcel of land. Unless its bare existence as an intermediary was doing business, it is hard to imagine how it could be less engaged."

The case of *Lane Timber Co. v. Hynson,* 4 Fed. 2nd, 666, decided by the Circuit Court of Appeals of the Fifth Circuit, is exactly in point on its facts. The Lane Timber Co. was organized in 1906 and acquired

2,000 acres of land in Oregon, which it had owned ever since, and did not own any other property. It bought another tract in 1907, but sold it during the same year. Its charter authorized it to buy, sell and deal in real and personal property and stumpage, logs, timber and all kinds of building materials. By a contract entered into in 1906 the company employed agents and authorized them to sell its land, and from time to time, including the year for which the tax was collected, inquired of its agents as to the prospects of a sale. These agents had continuously made efforts to sell, but without success. The plaintiff also had an agent in Oregon upon whom process may be served. It had paid taxes on the land, but had received no revenue from it, maintained no office and had no employees. Basing its decision on *McCoach v. Minehill & Schuylkill Haven Railroad Co.,* supra, and the rule as laid down in the *Von Baumbach* case, supra, the court held that the company was not subject to the capital stock tax imposed by the Revenue Act of 1918, saying in part:

> "It is defendant's contention that a corporation which does what its charter authorizes it to do is liable for the corporation tax and that the plaintiff, because it was authorized to hold title to the land, and was doing so with the expectation of selling at a profit, was engaged in business. If a corporation is not engaged in business, it cannot make any difference that what it is doing is authorized by its charter. Owning land is not doing business, nor is paying taxes. Most owners of land, whether corporations or individuals, would be willing to sell at a profit. In our opinion the mere fact that the plaintiff selected agents who

made efforts to sell its land does not render it liable."

The government, in its brief, maintains that this case is not good authority and that the opinion of the dissenting judge is the correct one, but, in answer to this, it may be pointed out that, in the first place, the government did not apply to the United States Supreme Court for a writ of certiorari to have the decision of the Circuit Court of Appeals reviewed, and, in the second place, the decision has never been overruled or questioned in any later case. The government contends that this case is in conflict with the case of *Edwards v. Chile Copper Company,* 270 U. S. 452, 70 L. Ed. 678, which case will be discussed later; but it should be observed that the decision in the latter case was rendered more than a year after the decision in the *Lane Timber Company* case and, while it appears that the *Lane Timber Company* case was cited in the brief of counsel for the taxpayer, the Supreme Court in its opinion did not question the soundness of that decision.

In *Monroe Timber Co. v. Poe,* 21 Fed. 2nd 766 (District Court of Wash.), plaintiff sued to recover capital stock taxes paid by it for the three fiscal years, July 1, 1922, to June 30, 1925, on the ground that it was not doing business and that its activities were exclusively restricted to the holding of its properties, which consisted entirely of timber land in the State of Oregon, and doing only such acts as were necessary to the maintenance of its corporate existence and the private management of its purely internal affairs. It

appeared that plaintiff purchased in 1906, 1907 and 1908 approximately 8000 acres of timber land which it has been holding since about 1912 for purposes of sale. In July, 1922 plaintiff purchased 160 acres of land. In December, 1923 it sold 180 acres of land. The court was of the opinion that, in view of the purchase in July, 1922 and the sale in December, 1923, the plaintiff was doing business and was subject to capital stock tax for those taxable years, but the court further held that, for the fiscal year ending June 30, 1922, the company was not engaged in business and was entitled to recover the tax paid. This case is therefore another illustration of the rule that the owning of property does not constitute doing business.

In *Fink Coal & Coke Co. v. Heiner,* (District Court, Western District of Pennsylvania, not yet officially reported) (Volume III Commerce Clearing House 1928 Standard Federal Tax Service, page 8164), it appeared that plaintiff was incorporated in 1902 with the usual broad charter powers, for the purpose of acquiring 8000 acres of coal land in West Virginia. From time to time thereafter until 1906 it acquired about 2000 additional acres. Its main object was to mine and market its coal. There was a railroad to be built which would have served plaintiff, but the project was abandoned, and this left plaintiff without any practicable method of transporting its coal to market, so the mine was never opened. During the years in question the stockholders authorized the directors to sell the coal properties, but no sale was ever made. The directors and stockholders held meetings and as-

sessments were levied to pay expenses, including taxes and salaries of $100 and $15 yearly to the treasurer and secretary, respectively, and postage and other charges. The stockholders hoped that conditions would change and they would be able to sell the coal lands at a profit or mine the coal. The court held that plaintiff was not liable for the capital stock tax imposed by the Revenue Acts of 1918 and 1921, specifically basing its opinion on the test laid down in the *Von Baumbach* case, supra, and also on the case of *Lane Timber Company v. Hynson,* supra, and pointing out that the maintenance of its corporate existence and the ownership of property did not constitute the doing of business by plaintiff.

Four other recent decisions of Circuit Courts of Appeals approving the rule contended for here are:

United States v. Three Forks Coal Co., 13 Fed. 2nd, 631 (3rd Circuit);

Eaton v. Phoenix Securities Co., 22 Fed. 2nd, 497 (2nd Circuit);

Rose v. Nunnally Investment Co., 22 Fed. 2nd, 102 (5th Circuit);

and

Cannon v. Elk Creek Lumber Co., 8 Fed. 2nd, 996 (7th Circuit).

Coming now to the recent case of *Edwards v. Chile Copper Co.,* supra, upon which defendant chiefly relies, an examination of its facts will instantly disclose a situation which is not in point here. The Chile Copper Company, the company held liable for capital stock tax in that case, was a holding company, one in-

corporated to hold all the capital stock of the Chile Exploration Company. Furthermore, it was incorporated to meet a certain difficulty, to wit: the inability of the Exploration Company, which owned mines in Chile and needed large sums of money to develop them, to mortgage its property to raise the money. Hence, the Chile Copper Company was organized and it issued bonds secured by a pledge of all the capital stock of the Exploration Company and furnished the proceeds from time to time to the latter company to enable it to go on with its work. The gist of the decision is found in the following words of Mr. Justice Holmes:

> "In our opinion the plaintiff was liable to the tax. We do not rest our conclusion upon the issue of bonds in the first year or the call loans made in the last, and, for the same reasons, we cannot let the fagot be destroyed by taking up each item of conduct separately and breaking the stick. The activities and situation must be judged as a whole. Looking at them as a whole we see that the plaintiff was a good deal more than a mere conduit for the Chile Exploration Company. It was its brain or at least the efferent nerve without which that company could not move. The plaintiff owned and by indirection governed it, and was its continuing support, by advances from time to time in the plaintiff's discretion. There was some suggestion that there was only one business and therefore ought to be only one tax. But if the one business could not be carried on without two corporations taking part in it, each must pay, by the plain words of the act."

We think it is clear that there is nothing in this case which tends to question in any way the rule

established in the former cases that the ownership of property and maintenance of corporate existence does not constitute doing business. As a matter of fact, Mr. Justice Holmes himself makes this clear, for he goes on to say:

> "The case is not governed by McCoach v. Minehill & S. H. R., supra, and United States v. Emery, Bird, Thayer Realty Co., supra. It is nearer to Von Baumbach v. Sargent Land Co., supra."

In other words, the former cases establishing that rule are not only not questioned but, in effect, are approved and simply distinguished from the case at bar. Subsequent decisions have also remarked this. In *Eaton v. Phoenix Securities Company,* supra, it is said:

> "Edwards v. Chile Copper Co. recognized the continued authority of McCoach v. Minehill R. R. Co. and U. S. v. Emery, Bird, Thayer Realty Co. * * *."

In *Fink Coal & Coke Co. v. Heiner,* supra, the court said:

> "The defendant has cited Edwards v. Chile Copper Co., 270 U. S. 452 (U. S. Tax Cases 138), in support of his position, and has called attention to the following from the opinion by Mr. Justice Holmes:
>
> "'The exemption "when not engaged in business" ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit.'
>
> "The Chile Copper Company case, with its intimation just quoted, unquestionably tends to limit the number of corporations 'not engaged in

> business'. But it is a case treating of the association of two corporations which was not the ordinary relation between a parent organization and a holding company, and was not designed to overturn all previous decisions of the Court and the principles therein set forth. In the opinion Mr. Justice Holmes, for example, cites the Emery, Bird, Thayer case and distinguishes it, but does not overrule it. The decision would be unduly extended if it were to be held that it sets aside the declaration in Flint v. Stone Tracy Co., 220 U. S. 107, repeated in McCoach v. Minehill Railway case to the effect that the corporation tax was not imposed upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation."

Similar observations are to be found in *Rose v. Nunnally Investment Company,* supra, and *United States v. Three Forks Coal Company,* supra.

The government also relies upon *Von Baumbach v. Sargent Land Co.,* supra, but that case is also distinguishable on its facts. There the corporations involved not only owned large tracts of timber land, from which the timber had been cut, and which contained valuable deposits of iron ore, but they leased part of the properties for the mining of iron ore, received certain royalties as rentals, sold certain parcels of real estate, sold stumpage from some of the timber properties and rented and leased certain other parcels of real estate, and, to insure the proper carrying on of the mining operations, employed another corporation, engaged in engineering and inspection of ore properties, to provide supervision and inspection of work upon their properties. The mere mention of these facts shows that the corporations in

question were engaged in various activities which naturally led the Supreme Court to hold that they were doing business, and further shows that the case is not an authority against us. Moreover, it was in this very case that the court, in the quotation hereinbefore set forth, laid down the rule that the owning and holding of property did not constitute doing business, and the case may be said to be an authority in our favor. It was because "their activities included something more than a mere holding of property and the distribution of the receipts thereof" that the court held those corporations taxable.

A possible contention of the government may appropriately be disposed of here. In the quotation from the *Von Baumbach* case, hereinbefore set forth, it will be noted that the court used the word "reduced", the phrase reading:

> "A corporation which has *reduced* its activities to the owning and holding of property."

In that quotation the court did not use the word "reduced" literally to mean a corporation which had necessarily engaged in greater activities and which then had cut down its activities to the owning and holding of property, but used it rather in the sense of "confined". Judge Gibson, in *Fink Coal & Coke Co. v. Heiner,* supra, makes this clear, saying:

> "The word 'reduced', doubtless adopted from the regulations promulgated by the Treasury Department by authority of the tax act, is synonymous with the word 'confined', as used in Von Baumbach v. Sargent Land Co., supra, and prior decisions."

And conclusive proof of this is found in the case of *United States v. Emery, Bird, Thayer Realty Co.,* supra, decided prior to the *Von Baumbach* case, where the corporation held not taxable had been specifically incorporated to take title to certain property and then lease the same to the dry goods company, and which therefore had not literally reduced its activities to the owning and holding of property, but had simply confined its activities thereto.

Defendant also contends that all the activities of plaintiff must be taken into consideration and that because plaintiff, in addition to owning and holding a tract of land, also managed it, executed a bond issue secured by a mortgage on it and raised money by assessments against the stockholders with which to pay taxes, carrying charges and expenses, it must be held to have been doing business during the period in question. The answer to this is that the rule is well established that, where a corporation's only purpose or activity is the owning and holding of property, the fact that it manages that property, receives the income from it, borrows money on it, maintains an office and pays taxes and expenses, and levies assessments on its stockholders, does not have the effect of making such corporation one which is doing or engaged in business within the meaning of the tax statutes. This was established in *McCoach v. Minehill & S. H. R. Co.,* supra, where the corporation in question received an annual rental of $252,612, had bank deposits on which it received interest annually, had a contingent fund, the annual income from which was $24,000, paid state taxes of about $24,000, maintained an office and

paid salaries to its officers and employees at an annual expense of about $5000, and where the court nevertheless held the corporation was not doing business and was not taxable. In this connection the court used the following language:

> "But that reasoning furnishes no support for the contention that the mere receipt of income from property, and the payment of organization and administration expenses incidental to the receipt and distribution thereof, constitute such a business as is taxable within the meaning of the act of 1909. The distinction is between (a) the receipt of income from outside property or investments by a company that is otherwise engaged in business; in which event the investment income may be added to the business income in order to arrive at the measure of the tax; and (b) the receipt of income from property or investments by a company that is not engaged in business except the business of owning the property, maintaining the investments, collecting the income, and dividing it among its stockholders. In the former case the tax is payable; in the latter not."

The *McCoach* case is, in fact, stronger than the present one, for the Hotchkiss Redwood Company had no income whatever during the period in question (disregarding the one sale in 1920 to the County of Del Norte) and had to pay its expenses out of the proceeds of stockholders' assessments. The language which the court used in *Flint v. Stone Tracy Co.,* 220 U. S. 107, 55 L. Ed. 389, is also pertinent here:

> "It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation, but upon the doing of

corporate or insurance business and with respect to the carrying on thereof."

B.

IF THE CAPITAL STOCK TAX WERE HELD TO APPLY TO PLAINTIFF, THE TAX WOULD BE A DIRECT TAX ON PROPERTY AND THEREFORE VIOLATIVE OF ARTICLE I, SECTION 9, CLAUSE 4, AND ARTICLE I, SECTION 2, CLAUSE 3, OF THE UNITED STATES CONSTITUTION, AS NOT APPORTIONED TO THE STATES ACCORDING TO POPULATION.

There is a further ground for denying plaintiff's liability for the tax in question. As the evidence shows, plaintiff is the owner of a tract of timber land and is not engaged in any other activity and had no income during the period in question. Under such circumstances, the imposition of the capital stock tax on plaintiff is necessarily the laying of a direct tax on plaintiff's tract of land, the only property owned by it, which tax would be unconstitutional under Article I, Section 9, Clause 4, and Article I, Section 2, Clause 3, of the United States Constitution, since the tax is not apportioned to the states according to population.

And several cases have so held.

In *Fink Coal & Coke Co. v. Heiner,* supra, it is said:

> "The contention of the defendant herein, if upheld, would have the effect of making the taxing statute impose a direct tax upon the property of the corporation—a power not possessed by Congress unless apportioned to the states according to population."

In *Monroe Timber Co. v. Poe,* supra, Judge Cushman said:

> "If the act is construed as imposing such a tax, it would imperil its constitutionality."

In the District Court opinion, in the case of *Rose v. Nunnally Investment Co.,* 14 Fed. 2nd, 189, it is said:

> "If the only substantial corporate activity is the ownership and preservation of real and personal property, the receipt of its ordinary income, which arises from the property itself, rather than from active use and management of it, and the distribution of such income to the stockholders, with only such corporate organization and activity as is necessary thereto, there is not such a doing of business as is meant by the act. While such activity is 'business' in a broad sense, a tax upon such business would be in substance one on the mere ownership of property, becoming thus a direct tax and beyond the power of Congress, except when apportioned to the states according to population."

See, also, *Flint v. Stone Tracy Co.,* supra.

We are unable to perceive how the government can avoid this constitutional difficulty.

In conclusion, we respectfully submit that:

1. The rule is well established that the owning and holding of property by a corporation and the maintenance of its corporate existence, and the carrying on of its purely internal affairs does not constitute the doing of business so as to render such corporation subject to the capital stock tax.

2. The rule is also well established that, where the corporation's sole activity consists in the owning and holding of property, the fact that it also manages that property, borrows money on bonds secured by a mortgage thereon, maintains an office and incurs expenses yearly for taxes, salaries of officers and employees, and other charges which it meets by levying assessments upon its stockholders, does not have the effect of rendering such corporation one which may be said to be doing business within the purview of the capital stock tax act.

3. Under the rules hereinbefore set forth, it follows conclusively as a matter of law that plaintiff was not doing business during the period in question and was not subject to capital stock tax.

4. If the capital stock tax were held to apply to plaintiff, the tax would be a direct tax on property and therefore unconstitutional, as not apportioned to the states according to population.

5. Because of all of the foregoing, the judgment appealed from herein should be affirmed.

Dated, San Francisco,
March 12, 1928.

Respectfully submitted,
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ESMOND SCHAPIRO,
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